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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EMILY T., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and PAYTON G., Appellees.	2 CA-JV 2008-0085 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD0200700025

Honorable Joseph R. Georgini, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Appellant Emily T. appeals from the juvenile court's order of August 14, 2008, terminating her parental rights to her daughter, Payton G., on grounds of abandonment, A.R.S. § 8-533(B)(1), and the length of time Payton had remained in a court-ordered, out-of-home placement, § 8-533(B)(8)(a). Emily had been personally served with the motion to terminate her rights and concedes she had notice of the initial termination hearing, but she did not attend the hearing and instead appeared only through counsel. She contends on appeal that she was denied due process of law, alleging the juvenile court denied her a meaningful opportunity to be heard before terminating her parental rights. She further contends the court abused its discretion by proceeding in her absence to receive evidence in support of the termination order. We affirm.

¶2 In general, we will not disturb a juvenile court's decision to terminate a parent's rights if there is reasonable evidence to support the court's order. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). But we review de novo legal issues concerning the interpretation of statutes and rules governing termination proceedings. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 9, 158 P.3d 225, 228 (App. 2007) (interpretation of Rule 64, Ariz. R. P. Juv. Ct.); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 9, 83 P.3d 43, 47 (App. 2004) (interpretation of § 8-533). We view the evidence in the light most favorable to affirming the juvenile court's ruling. *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, ¶ 20, 159 P.3d 562, 566 (App. 2007).

¶3 Payton was born in January 2006 with congenital nephrotic syndrome, a potentially fatal kidney disease requiring "much medical attention and consistent care." She was hospitalized with a serious infection in January 2007 and remained in the hospital for nearly four months, during which doctors removed her left kidney and amputated most of her toes and part of one foot. While Payton was hospitalized, Child Protective Services (CPS) received in February 2007 two reports alleging parental neglect. Payton's parents, who had at first been visiting her weekly, had stopped visiting and were suspected by family members and hospital staff of using illegal drugs. The hospital reportedly was unwilling to discharge Payton to her parents' custody because the parents appeared unable to care for such a medically fragile child.

¶4 On February 20, 2007, Payton's maternal grandmother, Sara B., filed a private dependency petition. The juvenile court appointed counsel for Emily at a temporary custody hearing on February 20, and she was personally served the following day with the dependency petition and notice of the preliminary protective hearing scheduled for February 26. Emily's counsel, but not Emily, appeared on February 26, at which time the court ordered the combined "pre-protective hearing" and initial dependency hearing continued until March 19. On March 19, Emily's counsel apparently again appeared without Emily, and the court allowed the Arizona Department of Economic Security (ADES) to be substituted as petitioner in place of Sara and to file an amended dependency petition. In

April, the court permitted ADES to file a second amended petition "to add an alleged father."

¶5 Payton was adjudicated dependent at a hearing in September 2007, at which Emily again appeared only through counsel. The juvenile court stated in its minute entry that it was "defaulting Emily" and scheduled a permanency planning hearing for March 10, 2008. In a report to the court prepared for the permanency hearing, ADES noted that neither parent had yet contacted CPS or begun to participate in the case plan, all attempts to locate the parents had been unsuccessful, and their current whereabouts were unknown, although "[t]hey ha[d] been seen in the Casa Grande area." Emily's counsel attended the permanency hearing, held on March 11, 2008, at which the court changed the case plan goal from family reunification to severance and adoption.

¶6 Subsequently, ADES filed both a motion and an amended motion to terminate Emily's parental rights to Payton. An initial termination hearing, originally scheduled for April 2, 2008, was continued until June 23, 2008. In the interim, on May 19, ADES personally served Emily with process after locating her in Tucson. Emily's counsel appeared, again without Emily, at the June 23 hearing, at which counsel for ADES submitted an affidavit of service showing that Emily had been personally served on May 19 with the first amended motion for termination and notice of the June 23 hearing. After finding Emily had received proper notice, the juvenile court attempted to terminate her

parental rights by default without first having received evidence in support of the motion for termination.

¶7 Provided a parent has been properly served and fully informed of the consequences of failing to appear for an initial termination hearing or termination adjudication hearing, a juvenile court may proceed in the face of the parent's unjustified absence to terminate the parent's rights "based upon the record and evidence presented" if legal grounds for termination are proven. A.R.S. § 8-863(C); Ariz. R. P. Juv. Ct. 65(C)(6)(c), 66(D)(2); *see also* Ariz. R. P. Juv. Ct. 64(C) (notice of initial termination hearing shall inform parent that unjustified failure to appear may be deemed to be waiver and admission and that hearing may proceed to final termination order in parent's absence).

¶8 To remedy its oversight in having attempted to grant the motion for termination on June 23 without first having determined from "the record and evidence presented" that ADES "ha[d] proven grounds upon which to terminate [Emily's] parental rights," Rules 65(C)(6)(c) and 66(D)(2), the juvenile court held a further hearing on July 16, 2008. At that hearing, the case manager testified, and ADES introduced an exhibit comprising the case plan, three reports of the Foster Care Review Board, and various CPS reports to the court. At the conclusion of the July hearing, the court found by clear and convincing evidence that Emily had been properly served with notice of the June 23 initial termination hearing, at which her "default" was entered when she failed to appear, and that ADES had proven as statutory grounds for termination both abandonment and nine-month out-of-home

placement. The court further found that terminating Emily's parental rights was in Payton's best interests and thus ordered Emily's rights severed nunc pro tunc to June 23, 2008.

¶9 As far as the record reflects, despite Emily's assertions in her opening brief, her counsel did not object below to the entry of her "default" on June 23 or to the further hearing on July 16 at which the court received evidence before ordering her rights severed.[1] Emily has not moved to set aside the entry of default nor offered even an explanation, much less a justification, for her failure to attend the hearings on June 23 and July 16—or, for that matter, for her absence throughout the eighteen-month dependency proceeding. Nor does she contend that ADES or the juvenile court failed to comply with the statutes and procedural rules that authorized the court to proceed in her absence as it did. As she states in her opening brief, she "does not claim she was improperly served or lacked actual notice of the Initial Termination Hearing before it was held on June 23, 2008."

¶10 Rather, despite having been served with process; despite having had actual notice of the two hearings, both attended by her counsel, at which her default was entered in June and her rights were terminated in July; and despite having been adequately apprised

[1]In her opening brief, Emily cites page five of the "Trial Record of July 16, 2008," in support of her assertion that "[t]he Court improperly overruled [her] counsel's objection to proceed to severance." But neither on page five nor elsewhere in the sixteen-page transcript do we find any objection interposed by Emily's counsel to the court's proceeding in her unexplained absence. Nor does either page sixteen of the transcript or the minute entry from the July 16 proceeding bear out her assertion that "ADES's Exhibit 1 [was admitted] over objection of [Emily's] counsel." Whether these errors were accidental or purposeful, counsel does not advance his client's cause through such misstatements.

of the consequences should she fail to attend a scheduled hearing, Emily nonetheless contends: "By proceeding forward, [the juvenile court denied her] the opportunity to be heard in a meaningful time and in a meaningful manner, therefore depriving her of her due process rights to be heard and present evidence on her own behalf." She further asserts, without citation of supporting authority, that "Rule 64(C) as applied by the Trial Court clearly does not comport with the standards for due process for the Appellant."

¶11 Emily's conclusory assertion lacks merit. She correctly observes in her opening brief that "[t]he essence of due process is reasonable notice and an opportunity to be heard." *See In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994) (explaining due process "required 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections'"), *quoting Maricopa County Juv. Action No. JS-734*, 25 Ariz. App. 333, 339, 543 P.2d 454, 460 (1975). She acknowledges that "the applicable statute[,] A.R.S. § 8-863," and Rule 65(C)(6)(c) both "afford a parent the right to notice and an opportunity to be heard" before the parent's rights may be terminated.[2] She further acknowledges she had actual, prior notice of the initial termination hearing held on June 23 and does not contend the procedures specified in the applicable statutes and rules were not followed. Yet she makes the unsupported assertion that the

[2]Emily's brief refers to "Rule 64(C)(6)(c)," but Rule 64 contains no such subsection. We assume Emily intended to refer instead to Rule 65(C)(6)(c).

juvenile court should have "reset [the matter] for another Hearing to permit [her] to be present."

¶12 Even had Emily not waived this argument by failing to assert it below, *see Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994), we would reject it out of hand. The juvenile court has not only parents' fundamental interest in the care and custody of their children to consider but also the best interests of those children to protect. *See generally* Ariz. R. P. Juv. Ct. 36 (procedural rules in dependency actions interpreted to protect child's health, safety, and best interests); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 24, 40, 110 P.3d 1013, 1018, 1021-22 (2005) (parental rights not absolute; state has vital interest in protecting children). The best interests of a dependent child would not be served if a parent could avoid or indefinitely delay a final termination adjudication, and thus permanency for the child, simply by refusing to attend the termination hearing while claiming the parent's presence was essential before the court could order severance. *See generally Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶¶ 12, 14, 158 P.3d 225, 229-30 (App. 2007) (recognizing authority conferred on juvenile court by statutes and rules "to terminate the parental rights of a parent who . . . fails to appear without good cause" at any one of enumerated hearings during termination proceeding).

¶13 We likewise reject Emily's second contention, that the juvenile court abused its discretion by proceeding in her unexplained absence on July 16 to receive testimony and evidence before ordering Emily's parental rights to Payton terminated. Emily was

represented by counsel at both the June 23 and July 16 hearings, as she had been throughout the dependency proceeding, and her attorney cross-examined the CPS case manager, the sole witness to testify at the continued termination hearing. Contrary to Emily's assertion on appeal, her counsel did not object to the admission of the one exhibit ADES offered in evidence. Emily thus waived any objection to the court's consideration of the case plan and other reports that constituted the exhibit. *See Adrian E.*, 215 Ariz. 96, ¶ 24, 158 P.3d at 232 (juvenile court properly considered exhibits to which parent waived objection by failing to assert); *cf. Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 34, 181 P.3d 1126, 1136 (App. 2008) (juvenile court at termination hearing may properly consider exhibits previously admitted at earlier hearings during dependency proceeding).

¶14 Finding no legal error, no abuse of the juvenile court's discretion, and no merit to either issue raised on appeal, we affirm the judgment entered on August 14, 2008, terminating Emily's parental rights to Payton.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge